CHAPTER II. THE ADMINISTRATIVE CLAIM REQUIREMENT

A. GENERAL

It is important to remember that the waiver of the United States' sovereign immunity is a matter of congressional grace. Since Congress has the power to repeal the entire FTCA, it clearly has the power to place lesser limitations on the right to sue the United States.

Substantial litigation has resulted from noncompliance with the requirements for the filing of an administrative claim. The federal courts generally treat these requirements as jurisdictional prerequisites to suit; failure to comply with the administrative claim requirement will bar an otherwise meritorious suit.[1]

A claimant's first requirement is to submit an administrative claim. The Attorney General's regulations implementing the FTCA require a claimant to file an administrative claim[2] with the "agency whose activities gave rise to the claim."[3] The submission of a claim is an absolute condition precedent to filing suit.[4] The government can settle claims faster and less expensively through administrative processing than through litigation. If a claim is submitted to the wrong agency, the same Attorney General's regulations require the receiving agency to

[1] McNeil v. United States, 508 U.S. 106 (1993) (a district court lacks jurisdiction over a lawsuit filed before proper filing of an administrative claim under the FTCA); Montoya v. United States, 841 F.2d 102 (5th Cir. 1988); Burns v. United States, 764 F.2d 722 (9th Cir. 1985); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971).

[2] 28 U.S.C. § 2675 (1994). A proper administrative claim is a jurisdictional prerequisite to suit.

[3] 28 C.F.R. § 14.2(b)(1) (1996).

[4] Pipkin v. U.S. Postal Service, 951 F.2d 272 (10th Cir. 1991) (a civil service grievance was not an FTCA claim); Verner v. United States, 804 F. Supp. 381 (D. D.C. 1992) (a veteran's request for benefits cannot be construed to be an FTCA claim).

transfer the claim to the appropriate agency and to notify the claimant of the transfer. The failure of an agency to "transfer . . . [a claim] forthwith to the appropriate agency" may, in effect, extend the statute of limitations or excuse presentment to the "appropriate agency."[5]

Local claims offices process the majority of the Army's administrative claims. The U.S. Army Claims Service provides technical supervision and support. Most local Army claims authorities have the power to compromise claims[6] based on factors such as the merits of the claim, trial risks, witness credibility, and the precedential value of settlement.

B. THE WRITTEN CLAIM

The administrative process begins when the claimant files his or her administrative claim with the government agency allegedly responsible for the injury or damage suffered. In the Army, this is often the claims section of the staff judge advocate's office; however, any office of the agency is sufficient.[7] "Claim" is a term of art. For purposes of the FTCA, a "claim" is a written demand for the payment of a specified sum of money, that is signed by the claimant or a duly authorized agent or representative.[8] Federal agencies prefer that claimants use a Standard Form 95 (SF95), but any writing satisfies the statutory requirement if it contains a demand for

[5] Bukala v. United States, 854 F.2d 201 (7th Cir. 1988).

[6] 28 U.S.C. § 2672 (1994). *See* AR 27-20, para. 4-6 for specific delegations of settlement authority. The Department of Justice must approve settlements in excess of $25,000.

[7] Owens v. United States, 531 F. Supp. 532 (N.D. Ga. 1982); Frey v. Woodard, 481 F. Supp. 1152 (E.D. Pa. 1979).

[8] 28 U.S.C. §§ 2401 and 2675(b) (1994); 28 C.F.R. § 14.2(a) (1996). *See, e.g.*, Santiago-Ramirez v. Secretary of Dept. of Defense, 984 F.2d 16 (1st Cir. 1993) (letter to AAFES Director of Administration complaining of dismissal and harassment and demanding $50,000 constitutes proper FTCA claim).

payment of a specific sum, contains sufficient information to investigate, and is signed by the claimant.

C. SUM CERTAIN

The failure to state damages in a "sum certain" has invalidated many claims. In many cases, the claimant or the claimant's representative decide, for a variety of reasons, to leave the dollar amount unspecified. Courts, however, have enforced the requirement to demand some specific amount.[9] Some claims are submitted by letter or SF95 with no sum certain but are accompanied by bills or receipts. Some courts have upheld this practice, but limited the claimant's recovery to the amounts stated in such bills or receipts.[10] In other cases, claimants approximate damages. In *Corte-Real v. United States*,[11] "approximately $100,000.00" was held to be a sum certain, but recovery was limited to $100,000.00.

The "sum certain" requirement serves two governmental purposes. First, it may dictate the claims approval and denial authority, which is based on the dollar amount of the claim. Second, the dollar amount will provide a ceiling on the damages recoverable in a lawsuit.[12] Plaintiffs may recover an amount greater than that demanded in the administrative claim only

[9] Suarez v. United States, 22 F.3d 1064 (11th Cir. 1994) ("unliquidated" in damages block of SF95 does not satisfy sum certain requirement); Bradley v. United States by Veterans Admin., 951 F.2d 268 (10th Cir. 1991) (demand "in excess of $100,000" does not meet requirement for sum certain); Montoya v. United States, 841 F.2d 102 (5th Cir. 1988); Burns v. United States, 764 F.2d 722 (9th Cir. 1985) Allen v. United States, 517 F.2d 1328 (6th Cir. 1975); Molinar v. United States, 515 F.2d 246 (5th Cir. 1975); Melo v. United States, 505 F.2d 1026 (8th Cir. 1974); Caton v. United States, 495 F.2d 635 (9th Cir. 1974) Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971). *Contra* Collins v. United States, 626 F. Supp. 536 (W.D. Pa. 1985).

[10] Mack v. United States, 414 F. Supp. 504 (E.D. Mich. 1976); Molinar v. United States, 515 F.2d 246 (5th Cir. 1975). *Contra* Schaeffer v. Hills, 416 F. Supp. 428 (S.D. Ohio 1976).

[11] 949 F.2d 484 (1st. Cir. 1991).

[12] 28 U.S.C. § 2675(b) (1994).

upon a showing of "newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts relating to the amount of the claim."[13]

Occasionally, a claimant will fail to provide information that is necessary for the agency to investigate or properly evaluate the claim. Claimants may be required to submit evidence and other information to substantiate their claims.[14] Failure to document or substantiate a claim may invalidate an otherwise valid claim.[15] As the following case illustrates, however, courts are generally unsympathetic to agency demands for additional substantiation when the claimant has complied with the statutory requirements.[16]

Adams v. United States
615 F.2d 284 (5th Cir. 1980)

I.

Jason Lee Adams was born at Eglin Air Force Base on July 25, 1976. Within 24 hours of his birth, the Air Force arranged for the child to be sent to Sacred Heart Hospital in Pensacola, Florida, for special treatment and evaluation. The Air Force then had him returned for care at Eglin.

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[13] *Id*. *See generally* Spivey v. United States, 912 F.2d 80 (4th Cir. 1990) (claimant's tardive dyskensia could not have been discovered before filing, therefore, upward adjustment permitted); Cole v. United States, 861 F.2d 1261 (11th Cir. 1988); Low v. United States, 795 F.2d 466 (5th Cir. 1986); Molinar v. United States, 525 F.2d 246 (5th Cir. 1975); Ianni v. United States, 457 F.2d 804 (6th Cir. 1972); Avril v. United States, 461 F.2d 1090 (9th Cir. 1972); Schwartz v. United States, 446 F.2d 1380 (3d Cir. 1971).

[14] 28 C.F.R. § 14.4 (1996).

[15] Cook v. United States, 978 F.2d 164 (5th Cir. 1992) (to constitute a proper claim, sufficient information must be submitted to permit investigation); Swift v. United States, 614 F.2d 812 (1st Cir. 1980); State Farm Ins. Co. v. United States, 446 F. Supp. 191 (C.D. Cal. 1978); Rothman v. United States, 434 F. Supp. 13 (C.D. Cal. 1977); Mudlo v. United States, 423 F. Supp. 1373 (W.D. Pa. 1976); Kornbluth v. Savannah, 398 F. Supp. 1266 (E.D.N.Y. 1975). *See also* Joseph H. Rouse, *What Constitutes a Proper Tort Claim?*, ARMY LAW., Mar. 1999, at 45.

[16] Kokaras v. United States, 980 F.2d 20 (1st Cir. 1992), *cert. denied*, 501 U.S. 819 (1993); GAF Corp. v. United States, 818 F.2d 901 (D.C. Cir. 1987); Charlton v. United States, 743 F.2d 557 (7th Cir. 1984); Warren v. United States Dep't of Interior, Bureau of Land Management, 724 F.2d 776 (9th Cir. 1984); Avery v. United States, 680 F.2d 608 (9th Cir. 1982); Tucker v. U.S. Postal Service, 676 F.2d 954 (3d Cir. 1982); Douglas v. United States, 658 F.2d 445 (6th Cir. 1981); Adams v. United States, 615 F.2d 284, *aff'd on rehearing*, 622 F.2d 197 (5th Cir. 1980).

The test results disclosed that the child had cerebral palsy secondary to hypoxic encephalopathy with spastic quadriplegia and microcephaly. The evaluation indicated that the child's condition was caused by brain damage resulting from a lack of oxygen to the brain, and that the child's prognosis was very poor. It is unlikely that his condition will ever improve or that he will have a very meaningful life. Jason will always require total care.

Gary L. Adams and Deborah A. Adams filed a claim with the Air Force against the United States on behalf of themselves and their son Jason pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-80. They alleged that the Air Force physicians who delivered Jason and provided Mrs. Adams with prenatal care negligently caused Jason to suffer permanent brain damage. In accordance with 28 C.F.R. § 14.2, the Adams submitted their claim on a completed Standard Form 95 to an Air Force claims officer at Eglin Air Force Base, Florida. Their claim, which alleged improper medical care by the Air Force, was filed on March 23, 1978, by their attorney, and was not answered within the six-month administrative review period.

The claims officer responded on March 31, requesting, under the authority of 28 C.F.R. § 14.4(b), written reports by any attending physicians who were not government employees, itemized bills and expenses, a statement of future expenses, and a signed medical authorization. The Adams' attorney wrote the claims officer on April 12, stating, "In my opinion, you have at your disposal all the necessary records to properly evaluate this claim." He added:

> We will fully develop this claim with respect to the private physicians and the necessary future expenses, and when you have had an opportunity to fully investigate everything at your disposal, we will be more than happy to exchange information in full.

In an April 18 letter, the claims officer stated that the requested information was "necessary to evaluate this claim and [was] required by this agency." He added that Jason had been transferred to Sacred Heart without a diagnosis; the Air Force physicians had been unable to determine the cause of the child's problems. The claims officer also stated:

> I assume that from your conversations with me you do not evaluate cases without having all the facts and also would not expect us to evaluate this case without having all the facts. In addition, your failure to cooperate and supply us with the necessary information could result in a denial of your claim on that basis and prejudice your rights to proceed in federal court.

On June 12, appellants replied, "I hope you understand that we are in no way refusing to cooperate with your office and will furnish to you all of the items requested in your earlier letters as soon as we have received

them ourselves." The Adams' executed medical authorizations were forwarded to the claims officer on July 5.

The claims officer wrote on July 19, asking that x-rays picked up by Mrs. Adams be returned as soon as possible "in order for me to complete the investigation of this claim." Responding on July 24, the Adams offered to return the x-rays, if the Air Force would promise to return them within ten days after receipt. On July 26, the claims officer insisted on the return of the x-rays, emphasizing that they were crucial to the evaluation of the claim and that without them the claim's merits could not be determined. They were returned on August 15.

In an affidavit dated November 14, the Adams' attorney stated that prior to filing the administrative claim, he had discussed Jason's condition with Air Force pediatrician Dr. Harlan W. Sindell. He stated further that he was told that Dr. Sindell had the "benefit of the medical information" obtained by Sacred Heart. Dr. Sindell's affidavit denies the fact. The claims officer's affidavit states that he never received this information or damage information. In short, there is a factual controversy as to what information was available to Air Force physicians. The Adams' attorney contends that he read the claims officer's letters as narrowing his requests, whereas the claims officer contends that his requests were cumulative.

After more than six months had passed without the settlement of their claim, the Adams brought this action in federal district court. They alleged that Jason's severe and permanent disabilities resulted from the negligent prenatal and delivery care provided by Air Force physicians. The district court found that the Adams had failed to make a proper claim with the Air Force. The court held that, even if the Air Force had the information needed to process their claim, the Adams were obligated both to state that they had not incurred any medical expenses of which the Air Force was not informed and to provide the Air Force with information regarding necessary future medical expenses. On this basis, their action was dismissed. The court did not reach the statute of limitations issue raised by the United States.

II.

Title 28 U.S.C. § 2765(a) establishes that as a prerequisite to maintaining a suit against the United States under 28 U.S.C. § 1346(b) a plaintiff must present notice of his or her claim to the appropriate federal agency. *Mack v. Alexander*, 575 F.2d 488,489 (5th Cir. 1978). Only after the claim has been denied or six months have passed may a plaintiff bring suit in federal court on the claim. 28 U.S.C. § 2675(a).

Under 28 U.S.C. § 2672, administrative agencies may settle claims presented to them. The Department of Justice promulgated 28 C.F.R. §§ 14.1-14.11 pursuant to section 2672. These regulations describe the settlement procedures to be followed by agencies and claimants.

The parties to this appeal dispute whether the Adams gave the Air Force sufficient notice to enable them to maintain this action. The United

States argues that the Adams failed to provide the Air Force Claims Officer with all of the information that he requested as necessary to evaluate their claims. Specifically, the Adams failed to comply with the 28 C.F.R. § 14.4(b) requirement that claimants provide the Air Force with written reports by nongovernmental attending physicians, with itemized bills and expenses, and with a statement of expected future medical expenses. The United States asserts, therefore, that because, in presenting the administrative claim, the Adams did not comply with the regulations governing the elements of a proper claim, 28 C.F.R. §§ 14.1-14.11, the district court properly dismissed their action. The Adams contend that their failure to submit this information resulted from a mutual misunderstanding, which does not warrant dismissal of their suit, and that, in any event, the Air Force did not need the information to evaluate their claim because it already possessed the information.

The Air Force, therefore, basically argues that the Adams' failure to comply with 28 C.F.R. § 14.4(b) denies them the jurisdiction of a federal court. It is apparently of no consequence that the Air Force already possessed, or had access to, most of the information demanded, such as pertinent medical records and itemized bills or expenses. All relevant medical records were prepared by either the Air Force's own physicians or by the physicians of Sacred Heart Hospital, where the Air Force's doctors arranged for various tests to be run on Jason Adams. Likewise the Air Force, which covered all expenses for the child's care, had access to itemized bills and expenses. The record does not indicate that the Adams' past medical expenses included any expense not covered by these bills. According to the Air Force, the inefficiency and inequity of demanding that a claimant produce information already in the Air Force's possession are immaterial. Section 14.2, it assumes, draws a line between an agency's claims officer and its personnel who allegedly negligently caused a particular injury. It is also apparently of no consequence that the remaining information sought by the Air Force was inherently speculative. Even when, as here, future medical expenses are exceedingly difficult to ascertain, the Air Force believes that it may condition federal court jurisdiction on the ability of claimants in a medical malpractice case to provide a definite statement of expected future medical expenses. In other words, claimants may be required to prepare the government's case or to prove their cases to a government claims officer before trial.

III.

The argument of the Air Force fails for two reasons. First, it erroneously assumes that the notice requirements of 28 U.S.C. § 2675 must be read in light of the settlement procedures established by 28 C.F.R. §§ 14.1-14.11, which were promulgated pursuant to section 2672. Such a reading clearly contravenes congressional intent. The question whether a plaintiff has presented the requisite section 2675 notice is determined without reference to whether that plaintiff has complied with all settlement related requests for information. Second, even assuming that the Air Force correctly contends that section 2675 must be construed in light of section 2672 and 28 C.F.R. §§14.1-14.11, the Adams would not be barred from bringing their claim in federal court. To the extent that those regulations attempt to define section 2675 notice, they do so in section

14.2. The parties agree, however, that section 14.2 has been satisfied; the Adams have merely failed to comply with section 14.4(b). On either basis, therefore, the Air Force's position must be rejected.

IV.

Congress' intent in enacting section 2675 is frustrated when the distinct functions of presenting notice and of engaging in settlement are confused in a way that impermissibly redefines the section 2675 notice requirement. The Air Force's argument confuses these two functions.

The relevant legislative history indicates two congressional purposes in requiring claimants to provide the relevant agency with notice of their claims. First, in enacting the notice requirement, Congress sought "to ease court congestion and avoid unnecessary litigation, while making it possible for the government to expedite the fair settlement of tort claims asserted against the United States." S.Rep.No. 1327, 89th Cong., 2d Sess. 6 [hereinafter cited as S.Rep.], *reprinted in* [1966] U.S. Code Cong. & Admin. News at pp. 2515, 2516. This efficiency purpose, however, accompanies a second purpose "of providing for more fair and equitable treatment of private individuals and claimants when they deal with the government or are involved in litigation with their government." S.Rep. at 5, *reprinted in* [1966] U.S. Code Cong. & Admin. News at pp. 2515-16.

The section 2675 requirement of filing a claim before instituting suit sought to bring the claimants' allegations to the immediate attention of the relevant agency. S.Rep. at 8, *reprinted in* [1966] U.S. Code Cong. & Admin News at 2518.

. . .

The two congressional purposes are adequately served if the prerequisite administrative claim is only the giving of "notice of an accident within a fixed time." S.Rep. at 7, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2715. Congress intended the section 2675 requirement of presenting notice to be construed in light of the notice traditionally given to a municipality by a plaintiff who was allegedly injured by a municipality's negligence. *Id*. Congress deemed this minimal notice sufficient to inform the relevant agency of the existence of a claim.

> The purpose of this notice [is] . . . to protect the [government] from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit.

Id. (quoting 18 E. McQuillin, The Law of Municipal Corporations, § 53.153, at 545 (3d ed. 1977)). This requisite minimal notice, therefore, promptly informs the relevant agency of the circumstances of the accident so that it may investigate the claim and respond either by settlement or by defense. In addition, as section 2675(b) shows, this notice was to include a statement of damages.

An individual with a claim against the United States, therefore, satisfies section 2675's requirement that "the claimant shall have first presented the claim to the appropriate Federal agency" if the claimant (1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and (2) places a value on his or her claim. S.Rep. at 7, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2517. *See generally*, 18 E. McQuillin, The Law of Municipal Corporations § 52.153 (3d ed. 1977); Annot. 62 A.L.R.2d 340, 341-51 (1958). This information alone allows the claimant to maintain a subsequent action in the district court following the denial of his or her claim by the agency or the passage of six months. Noncompliance with section 2675 deprives a claimant of federal court jurisdiction over his or her claim.

V.

Section 2672 governs agency conduct, including administrative settlement and adjustment of properly presented claims, once notice has been given pursuant to section 2675. *See* S.Rep. at 8, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2518. It facilitates settlement by authorizing the Department of Justice to promulgate regulations defining the settlement process for administrative claims and authorizing federal agencies to promulgate additional regulations and to "consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States." 28 U.S.C. § 2672. Thus, section 2672 creates a structure within which negotiations may occur. Noncompliance with section 2672 deprives a claimant only of the opportunity to settle his or her claim outside the courts.

The requirements of section 2675 and of section 2672 are, therefore, independent. Presentation of a claim and its settlement are distinct processes: "[section 2672] authorize[s] the head of each Federal agency to settle or compromise any tort claim presented to him [under section 2675]." S.Rep. at 8, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2518.

A claimant will ordinarily comply with 28 C.F.R. §§ 14.1-14.11 if he or she wishes to settle his or her claim with the appropriate agency. These requirements go far beyond the notice requirement of section 2675. Equating these two very different sets of requirements leads to the erroneous conclusion that claimants must settle with the relevant federal agency, if the agency so desires, and must provide the agency with any and all information requested in order to preserve their right to sue. This conclusion is not supported by relevant legislative history.

Congress explicitly recognized that, unlike routine cases, medical malpractice cases "involve difficult legal and damage questions," S.Rep. at 9, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2520, questions that are not always amenable to settlement, S.Rep. at 8, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2518. Agencies were not intended to bar cases involving difficult issues from federal court by turning their difficulty against the claimants. *See Executive Jet Aviation, Inc. v. United States*, 507 F.2d 508, 515-16 (6th Cir. 1974); S.Rep. at 9, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2520.

Section 2675 was meant to expedite the fair handling of ordinary tort cases in order to free the agencies to concentrate on more difficult cases.

A claimant's refusal to settle his or her claim will not deprive the federal court of jurisdiction, if the claimant has provided the statutorily required notice. Although many claimants will rationally elect to settle their claims, Congress clearly did not deem settlement mandatory.

VI.

Because Congress' express goals were achieving fairness and efficiency by giving the relevant agency the opportunity to investigate and to settle claims without the expense and delay of litigation, we cannot perceive any legislative authorization for reading the requirements of section 2675 in light of 28 C.F.R. § 14.4. The scheme is rational and coherent without such reading. An agency's demand for anything more than a written and signed statement setting out the manner in which the injury was received, enough details to enable the agency to begin its own investigation, and a claim for money damages is unwarranted and unauthorized. This is especially true if, as here, the agency already possesses most of the information it demanded.

Having satisfied Congressional standards for presenting a claim under 2675, the Adams are not barred from litigating their claim in federal court. The district court thus committed reversible error. The Adams notified the agency of their claim and assigned a value to it. This compliance is not erased merely because they did not obey the Air Force's demand that they provide additional information which would have been necessary for the administrative settlement of their claim.

A federal court's power to adjudicate a tort claim brought against the United States depends solely on whether the claimant has previously complied with the minimal requirements of the statute. 28 U.S.C. § 2675. Federal court power does not depend on whether a claimant has successfully navigated his or her way through the gauntlet of the administrative settlement process, which, according to the vagaries of the claims agent, may touch picayune details, imponderable matters, or both.

. . .

REVERSED and REMANDED. (Footnotes omitted).[17]

The FTCA requires a claimant not only to file an administrative claim, but also to allow the agency time to consider the claim.[18] After considering the claim, the government may respond

[17] The *Adams* case was affirmed on rehearing. Adams v. United States, 622 F.2d 197 (5th Cir. 1980).

[18] 28 U.S.C. § 2675(a) (1994).

in three ways: (1) approve and pay the full sum claimed; (2) fully deny the claim; (3) offer to compromise the claim.

When the Army denies a claim, it sends a notice of the denial by certified or registered mail to the claimant.[19] The denial is usually a statement that the government recognizes no liability for the claim. At this point, the claimant has completed the administrative process and is free to file suit in federal district court within six months of the date that the denial letter was mailed.[20]

Offers to compromise may be motivated by various factors. The government may acknowledge liability, but believe the claimed damages are excessive. Uncertainties in the law or potential defenses may also be a basis for negotiation. The government views its interest as best served by continuing administrative negotiation with a view toward administrative settlement. Quite often, several years pass and numerous offers and counter-offers are made between the initial filing and the final administrative compromise. The claimant may view the continuing negotiations with the same enthusiasm as the government or perceive the negotiations as futile. A disenchanted claimant may break off negotiations and file suit in federal district court six months after the initial administrative filing[21] or wait until the agency finally denies the claim.

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[19] AR 27-20, para. 2-58.

[20] 28 U.S.C. § 2401(b) (1994). *See* McGregor v. United States, 933 F.2d 156 (2d Cir. 1991) (failure to serve Attorney General within six months bars suit, and filing second suit to remedy error is not permitted); Woirhaye v. United States, 609 F.2d 1303 (9th Cir. 1979).

[21] 28 U.S.C. § 2675(a) (1994). The claimant may deem the agency's failure to settle within six months of filing as a "final denial." Parker v. United States, 935 F.2d 176 (9th Cir. 1991).

D. STATUTE OF LIMITATIONS

1. Administrative Claim

In many situations, no serious harm results from an improperly drafted or filed claim. The claimant simply files a second, correct claim. The second claim may be barred, however, if the statute of limitations has run before it is filed.

The federal statute of limitations appears at 28 U.S.C. § 2401(b):

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of the mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

This section controls all actions under the FTCA; state statutes of limitations are inapplicable in FTCA cases.[22] Noncompliance with the statute of limitations is an affirmative defense to an FTCA claim against the government.[23]

The FTCA statute of limitations establishes two limitation periods: (1) an administrative claim must be filed within two years of the date the claim accrues; and (2) suit must be filed within six months of an agency's final denial of the claim. Whether a valid claim exists is a question of state law,[24] but accrual of the claim is a question of federal law.[25] Few issues have

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[22] Bradley v. United States by Veteran's Admin., 951 F.2d 268 (10th Cir. 1991); Outman v. United States, 890 F.2d 1050 (9th Cir. 1989); Sexton v. United States, 832 F.2d 629 (D.C. Cir. 1987); Pittman v. United States, 341 F.2d 739 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965); Simon v. United States, 244 F.2d 703 (5th Cir. 1957).

[23] *See infra* notes 35-40, and accompanying text, discussing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), *reh'g denied*, 498 U.S. 1075 (1991).

[24] 28 U.S.C. §§ 1346(b), 2674 (1994); Klett v. Pim, 965 F.2d 587 (8th Cir. 1992) (FTCA cause of action controlled by state law--refusal by FmHA to grant farmer an operating loan is not a state tort); Richards v. United States, 369 U.S. 1 (1962); Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Henderson v. United

generated as much litigation as when an FTCA claim "accrues." The dispute is especially clear in medical malpractice cases, as illustrated by the following Supreme Court case.

United States v. Kubrick
444 U.S. 111 (1979)

> A provision of the Federal Tort Claims Act, 28 U.S.C. § 2401(b), bars any tort claim against the United States unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." In 1968, several weeks after having an infected leg treated with neomycin (an antibiotic) at a Veterans' Administration hospital, respondent Kubrick suffered a hearing loss, and in January 1969, was informed by a private physician that it was highly possible that the hearing loss was the result of the neomycin treatment. Subsequently, in the course of respondent's unsuccessful administrative appeal from the VA's denial of his claim for certain veteran's benefits based on the allegation that the neomycin treatment had caused his deafness, another private physician in June 1971 told respondent that the neomycin had caused his injury and should not have been administered. In 1972, respondent filed suit under the FTCA, alleging that he had been injured by negligent treatment at the VA hospital. The District Court rendered judgment for the respondent, rejecting the government's defense that respondent's claim was barred by the 2-year statute of limitations because it had accrued in January 1969, when respondent first learned that his hearing loss had probably resulted from the neomycin, and holding that respondent had no reason to suspect negligence until his conversation with the second physician in June 1971, less than two years before the action was commenced. The Court of Appeals for the Third Circuit affirmed, holding that if a medical malpractice claim does not accrue until a plaintiff is aware of his injury and its cause, neither should it accrue until he knows or should suspect that the doctor who caused the injury was legally blameworthy, and that here the limitation period was not triggered until the second physician indicated in June 1971 that the neomycin treatment had been improper.
>
> We disagree. We are unconvinced that for statute of limitation purposes, a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself, and the facts about causation may be in control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask, and if the

States, 846 F.2d 1233 (9th Cir. 1988); Mundt v. United States, 611 F.2d 1257 (9th Cir. 1980); Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978); Tyminski v. United States, 481 F.2d 257 (3d Cir. 1973).

[25] Bradley v. United States by Veteran's Admin., 951 F.2d 268 (10th Cir. 1991); Osborn v. United States, 918 F.2d 724 (8th Cir. 1990); Sexton v. United States, 832 F.2d 629 (D.C. Cir. 1987); Zeleznik v. United States, 770 F.2d 20 (3d Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); Portis v. United States, 483 F.2d 670 (4th Cir. 1973); Tyminski v. United States, 481 F.2d 257 (3d Cir. 1973); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962). *Contra* Tessier v. United States, 269 F.2d 305 (1st Cir. 1959).

defendant has failed to live up to the minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff.

In this case, the trial court found, and the United States did not appeal its finding, that the treating physician at the VA hospital had failed to observe the standard of care governing doctors of his specialty in Wilkes-Barre, Pa., and that reasonably competent doctors in this branch of medicine would have known that Kubrick should not have been treated with neomycin. Crediting this finding, as we must, Kubrick need only have made inquiry among doctors with average training and experience in such matters to have discovered that he probably had a good cause of action. The difficulty is that it does not appear that Kubrick ever made any inquiry, although meanwhile he had consulted several specialists about his loss of hearing and had been in possession of all the facts about the cause of his injury, since January 1969. Furthermore, there is no reason to doubt that Dr. Soma, who in 1971 volunteered his opinion that Kubrick's treatment had been improper, would have had the same opinion had the plaintiff sought his judgment in 1969.

We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort actions against the government. If there exists in the community a generally applicable standard of care with respect to the treatment of his ailment, we see no reason to suppose that competent advice would not be available to the plaintiff as to whether his treatment conformed to that standard. If advised that he has been wronged, he may promptly bring suit. If competently advised to the contrary, he may be dissuaded, as he should be, from pressing a baseless claim. Of course, he may be incompetently advised or the medical community may be divided on the crucial issue of negligence, as the experts proved to be on the trial of this case. But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make. If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about his injury.

The District Court, 435 F. Supp. at 185, and apparently the Court of Appeals, thought its ruling justified because of the "technical complexity," 581 F.2d at 1097, of the negligence question in this case. But determining negligence or not is often complicated and hotly disputed, so much so that the judge or jury must decide the issue after listening to a barrage of conflicting expert testimony. And if in this complicated malpractice case the statute is not to run until the plaintiff is led to suspect

> negligence, it would be difficult indeed not to apply the same accrual rule to medical and health claims arising under other statutes and to a whole range of other negligence cases arising under the Act and other federal statutes, where the legal implications or complicated facts make it unreasonable to expect the injured plaintiff, who does not seek legal or other appropriate advice, to realize that his legal rights may have been invaded.
>
> We also have difficulty ascertaining the precise standard proposed by the District Court and the Court of Appeals. On the one hand, the Court of Appeals seemed to hold that a Tort Claims Acts malpractice claim would not accrue until the plaintiff knew or could reasonably be expected to know of the government's breach of duty. 581 F.2d at 1097. On the other hand, it seemed to hold that the claim would accrue only when the plaintiff had reason to suspect or was aware of facts that would have alerted a reasonable person to the possibility that a legal duty to him had been breached. *Ibid*. In any event, either of these standards would go far to eliminate the statute of limitations as a defense separate from the denial of breach of duty.
>
> It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. We should give them effect in accordance with what we can ascertain the legislative intent to have been. We doubt that here we have misconceived the intent of Congress when § 2401(b) was first adopted or when it was amended to extend the limitations period to two years. But if we have, or even if we have not but Congress desires a different result, it may exercise its prerogative to amend the statute so as to effect its legislative will.
>
> The judgment of the Court of Appeals is
>
> Reversed.

Kubrick clearly rejected the argument that a plaintiff must know that an injury was negligently inflicted before the statute of limitations begins to run.[26] Knowledge of the injury itself and its cause suffice to start the two-year period running.[27] The *Kubrick* standard is objective; it measures the plaintiff's knowledge of an injury against that of a reasonable person

[26] 444 U.S. at 123.

[27] *Id*. at 122.

in the plaintiff's position. The claim accrues, and the statute of limitations begins to run, "when a reasonable person would know enough to prompt a deeper inquiry into potential causes."[28]

Courts have shown no reluctance to determine when a plaintiff knew or should have known of the injury.[29] The "cause" prong of the *Kubrick* test has been more troublesome, however.[30] Some courts have held that knowledge of the "immediate cause" of the injury is sufficient to start the statute running. In *Zeleznik v. United States*,[31] an illegal alien murdered the plaintiff's son. Eight years after the murder, the plaintiffs learned that the murderer had tried to turn himself in to the Immigration and Naturalization Service (INS) before the killing, but the INS negligently failed to detain him. Within two years of learning about the INS involvement, the plaintiffs filed a tort claim against the United States. The court rejected plaintiff's argument that the statute of limitations did not begin to run until they learned that the actions of the INS "caused" the death of their son. When their son was killed, the plaintiffs knew that they had been injured and the immediate cause of the injury. Those were "sufficient critical facts to put . .

[28] Nemmers v. United States, 795 F.2d 628, 632 (7th Cir. 1986), *aff'd*, 870 F.2d 426 (7th Cir. 1989); *See also* Barren v. United States, 839 F.2d 987 (3d Cir. 1988), *cert. denied*, 488 U.S. 827 (1998) (claim accrues when a plaintiff has facts that would enable a reasonable person to discover the alleged negligence, even though the government's negligence may have rendered the plaintiff mentally incapable of appreciating the significance of the facts).

[29] Bradley v. United States by Veteran's Admin., 951 F.2d 268 (10th Cir. 1992) (claim based on insertion and removal of elbow prosthesis more than two years before filing claims barred by SOL); *but see* Jastremski v. United States, 737 F.2d 666 (7th Cir. 1984) (physician-father, who was present in delivery room during difficult and allegedly negligent delivery of his son and who was aware that child suffered seizures within days of birth and subsequently developed an abnormal gait, held not to be aware of child's injury and its cause until 4 years later when a neurologist visiting the father casually observed the child and suggested that the abnormal gait might be caused by cerebral palsy).

[30] *See generally* Wagner, *United States v. Kubrick: Scope and Application*, 120 Mil. L. Rev. 139, 170-75 (1988).

[31] 770 F.2d 20 (3d Cir. 1985).

. [them] on notice that a wrong ha[d] been committed and that . . . [they] need[ed] [to] investigate to determine whether . . . [they were] entitled to redress."[32]

A more successful argument by claimants has been that accrual is tolled until the plaintiff learns that the government is somehow involved or responsible for his or her injuries. In *Drazan v. United States*,[33] a Veterans Administration hospital failed to follow-up on a suspicious lesion revealed by a chest x-ray during plaintiff's husband's annual physical exam. When the patient returned a year later for his annual physical, the tumor was much larger and was diagnosed as malignant. He died of cancer the following month. Ten months later, plaintiff requested and received her husband's medical records and learned of the earlier failure to follow-up the suspicious x-ray findings. Within two years of receiving the medical records, but more than two years after her husband's death, the plaintiff filed her tort claim. The government argued, and the district court held, that plaintiff knew of both the injury and its cause when she was told that her husband died of lung cancer. The Court of Appeals reversed and held that "[t]he cause of which a federal tort claimant must have notice for the statute of limitations to begin to run is the cause that is in the government's control, not a concurrent but independent cause that would not lead anyone to suspect that the government had been responsible for the injury; [t]he notice must be not of harm but of iatrogenic harm."[34]

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[32] *Id*. at 23. *Accord* Miller v. United States, 932 F.2d 301 (4th Cir. 1991) (decedent knew of alleged delay in diagnosing breast cancer in 1984; SOL started in 1984 under Va. law and wrongful death claim filed in 1988 within two years of death was time barred); Dyniewicz v. United States, 742 F.2d 484 (9th Cir. 1984); Steele v. United States, 599 F.2d 823 (7th Cir. 1979); Nahsonhoya v. United States, Civ. #91-946-PHX-SMM (D. Ariz. 1993) (SOL bars child abuse claims where school notified parents of possible abuse even though teacher's subsequent confession not made public).

[33] 762 F.2d 56 (7th Cir. 1985).

[34] *Id*. at 59.

The FTCA's statute of limitations has traditionally been viewed as a jurisdictional requirement; equitable considerations, estoppel, and "waiver" generally did not toll the running of the statute.[35] Recent cases, however, have applied the doctrine of equitable tolling to statutes of limitations previously considered jurisdictional. In *Irwin v. Department of Veterans Affairs*,[36] the Supreme Court held that the statute of limitations in a suit against the government is subject to equitable tolling "in the same way that it is applicable to private suits." Although *Irwin* involved a suit under Title VII of the Civil Rights Act, the Court clearly intended the holding to apply to all suits against the government. When the Eighth Circuit later applied the jurisdictional rule of the FTCA in *Schmidt v. United States*,[37] the Court remanded the case for reconsideration in light of *Irwin*.[38] Upon remand, the Eighth Circuit held that the FTCA's statute of limitations is not a jurisdictional prerequisite to suit, but rather an affirmative defense.[39] Since then, virtually all Circuit Courts of Appeal that have faced the issue have acknowledged that the FTCA statute of limitations is, indeed, subject to equitable tolling.[40]

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[35] L. JAYSON, HANDLING FEDERAL TORT CLAIMS, § 14.05 (1998).

[36] 498 U.S. 89 (1990), *reh'g denied*, 498 U.S. 1075 (1991).

[37] 901 F.2d 680 (8th Cir. 1990).

[38] Schmidt v. United States, 498 U.S. 1077 (1991).

[39] Schmidt v. United States, 933 F.2d 639,640 (8th Cir. 1991); *see also* Diltz v. United States, 771 F. Supp. 95 (D. Del. 1991) (equitable tolling based on *Irwin* in case of wrongfully placed stitch in eye surgery); Winters v. United States, 953 F.2d 1392 (Table) (10th Cir. 1992) (no equitable extension justified); McKewin v. United States, Civ. V91-131-CIV-5-7 (E.D. N. Car. 1992) (claim for brain damage at 1982 birth, filed 1990--parents knew of cause in 1987, no basis for equitable tolling); Muth v. United States, 804 F. Supp. 838 (S.D. W. Va. 1992), *aff'd*, 1 F.3d 246 (4th Cir. 1993) (no equitable tolling for claim filed in 1991 where claimant acknowledged contamination of land in 1988).

[40] DeCasenave v. United States, 991 F.2d 11 (1st Cir. 1993), Muth v. United States, 1 F.3d 246 (4th Cir. 1993); Krueger v. Saiki, 19 F.3d 1285 (8th Cir. 1994), *cert. denied*, 513 U.S. 905 (1994); Benge v. United States, 17 F.3d 1286 (10th Cir. 1994). *Contra* Bearden v. United States, 988 F.2d 117 (9th Cir. 1993) (FTCA statute of limitations is jurisdictional and "not subject to equitable tolling") (Unpublished Decision).

Infancy[41] or incompetence[42] generally will not toll the statute. In both situations, a guardian or next friend can initiate the claim and file suit in federal court. If the government's negligence has caused a claimant's incompetence, however, courts may find that the claim did not accrue, because the plaintiff lacked the mental capacity to understand the significance of the relevant facts.[43]

Deferring accrual for government-caused incompetence may seem equitable, but it ignores the requirement that waivers of sovereign immunity should be strictly construed.[44] It also ignores the objective nature of the *Kubrick* rule. As the Third Circuit observed in *Barren v. United States*:

> Although the VA's exacerbation of Barren's infirmity, and the causal relationship between this aggravation and plaintiff's inability to recognize his condition is a compelling reason to excuse his deficiency in failing to file his claim, as *Kubrick* makes clear, the rule cannot be subjectively applied. Allowing Barren to file later than an objectively reasonable person would be tantamount to ruling that a plaintiff's mental infirmity can extend the statute of limitations.[45]

Fraudulent concealment is another exception to the FTCA statute of limitations. The government has no duty to *sua sponte* admit fault or responsibility for a claimant's injury, but the agency may not conceal the facts needed by the plaintiff to determine whether a cause of

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[41] Crawford v. United States, 796 F.2d 924 (7th Cir. 1986); Jastremski v. United States, 737 F.2d 666 (7th Cir. 1984); Leonhard v. United States, 633 F.2d 599 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981).

[42] Robbins v. United States, 624 F.2d 971 (10th Cir. 1980); Casias v. United States, 532 F.2d 1339 (10th Cir. 1976).

[43] Washington v. United States, 769 F.2d 1436 (9th Cir. 1985); Clifford v. United States, 738 F.2d 977 (8th Cir. 1984).

[44] *See, e.g.,* United States v. Kubrick, 444 U.S. 111, 117-18 (1979); Soriano v. United States, 352 U.S. 270, 276 (1957); United States v. Sherwood, 312 U.S. 584, 590-91 (1941).

[45] 839 F.2d 987, 992 (3d Cir. 1988), *cert. denied*, 488 U.S. 827 (1988).

action exists. The court held in *Harrison v. United States*[46] that a claim filed 10 years after negligent medical treatment was not barred by the statute of limitations because the Air Force had actively concealed information and failed to provide the plaintiff with her medical records despite repeated requests.

The Soldiers' and Sailors' Civil Relief Act (SSCRA) extends the statute of limitations.[47] Continuous medical care from government sources may also toll accrual of a plaintiff's claim.[48] Additionally, courts have found that reassurances by government physicians that medical complications are "normal" or of no concern may delay the plaintiff's knowledge of his injury and postpone the running of the statute of limitations.[49]

2. Filing Suit.

The second prong of the statute of limitations requires a claimant to file suit within six months of the final denial of his or her claim. After filing the administrative claim, the claimant must allow the agency at least six months to investigate the claim. A lawsuit filed before the

[46] 708 F.2d 1023 (5th Cir. 1983).

[47] Conroy v. Aniskoff, 507 U.S. 511, 113 S. Ct. 1562 (1993) (soldier need not show that his military service prejudiced his ability to redeem property in order for SSCRA to toll Maine SOL); Kersetter v. United States, 57 F.3d 362 (4th Cir. 1995) (service member's claim for increased costs of raising child survives SOL bar of brain damaged daughter's claim); Miller v. United States, 803 F. Supp. 1120 (E.D. Va. 1992) (SSCRA applied to father-service member in brain damaged baby case, even though child and mother are barred by SOL); *but see* Romero by Romero v. United States, 806 F. Supp. 569 (E.D. Va. 1992) (where claim of child for brain damage at birth is barred by SOL, parents claim for mental anguish is also barred).

[48] Wehrman v. United States, 830 F.2d 1480 (8th Cir. 1987).

[49] Rosales v. United States, 824 F.2d 799 (9th Cir. 1987).

expiration of this six-month period will be dismissed for lack of subject matter jurisdiction.[50] If the agency has neither settled nor finally denied the claim within six months, the claimant may "deem the claim denied" and file suit in district court.[51]

A claimant may forego suit after six months have passed and allow the agency more time to investigate and settle the claim. The statute of limitations is tolled indefinitely until the agency denies the claim.[52] Should the agency at any point deny the claim by certified or registered mail, however, the claimant must file suit within six months of the date of mailing of the denial letter, or the action will be forever barred,[53]--even if less than two years have passed since the claim accrued.[54] An agency's oral or "final" settlement offer in negotiations does not satisfy the statutory requirement for a "final denial" that begins the running of the limitation period.[55]

A majority of courts count the six-month period as beginning the day after the notice is mailed and running through the day before the same calendar date six months later.[56] In

[50] McNeil v. United States, 508 U.S. 106 (1993) (suit filed before administrative claim or before six months have passed since filing of administrative claim must be dismissed as the court has no jurisdiction even though the six months has run by the time of dismissal).

[51] 28 U.S.C. § 2675(a) (1994).

[52] McAllister v. United States by U.S. Dept. of Agriculture, 925 F.2d 841 (5th Cir. 1991) (no time limit for filing suit if no final agency action).

[53] 28 U.S.C. § 2401(b) (1994); McNeil v. United States, 964 F.2d 647 (7th Cir. 1992), *aff'd*, 508 U.S. 106 (1993).

[54] United States v. Udy, 381 F.2d 455 (10th Cir. 1967); Anderson v. United States, 803 F.2d 1520 (9th Cir. 1986).

[55] Jerves v. United States, 966 F.2d 517 (9th Cir. 1992).

[56] Vernell v. U.S. Postal Service, 819 F.2d 108 (5th Cir. 1987); McDuffee v. United States, 769 F.2d 492 (8th Cir. 1985); Kollios v. United States, 512 F.2d 1316 (1st Cir. 1975); McGregor v. United States, 933 F.2d 156 (2d Cir. 1991) (failure to serve Attorney General within six months bars suit, and filing second suit to remedy error is not permitted).

McDuffee v. United States,[57] for example, the VA mailed the notice of denial by certified mail on April 8, 1980, and the plaintiff received the letter the following day. The plaintiff filed suit on October 9, 1980 -- six months to the day after receipt of the denial. The district court rejected as "hypertechnical" the government's argument that the claim was filed one day late. On an interlocutory appeal, the Eighth Circuit reversed and adopted the majority position that the date of mailing was the "trigger day." Under the "modern doctrine," the trigger day was excluded and the last day of the six-month period was included. Since the statute requires suit to be filed "within" six months, the period must end the day before the same calendar day as the trigger day six months later.[58] In other words, although a few courts have counted the six-month period from the day after mailing the notice of denial to the same calendar date six months later,[59] the last day to file a complaint under the majority rule is exactly six months from the day of the mailing of the notice of denial.

[57] 769 F.2d 492 (8th Cir. 1985).

[58] *Id*. at 494 (quoting *Kollios v. United States*, 512 F.2d 1316 (1st Cir. 1975)). *Accord* Scott v. U.S. Veterans Administration, 929 F.2d 146 (5th Cir. 1991) (six months runs on April 2 where denial notice mailed on October 2--suit filed on April 3 is untimely).

[59] Bledsoe v. Dep't of Housing and Urban Dev., 398 F. Supp. 315 (E.D. Pa. 1975); Rodriguez v. United States, 382 F. Supp. 1 (D.P.R. 1974).